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FILED
NOV 16 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966
No. 696

FRANK N. RILEY,
Lake County Engineer,
Petitioner,
vs.
THE STATE OF OHIO
on relation of
WILLIAM BINGHAM,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio.

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STATEMENT OF JURISDICTION

Petitioner alleges in the Statement of Jurisdiction in the Petition for a Writ of Certiorari that the Ohio Supreme Court decided "a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court." This we deny. The Supreme Court of Ohio did not deny the petitioner his right to a fair trial and the due process granted to him and provided by the Fourteenth and Fifth Amendments of the Constitution of the United States and by Article I, Section 16 of the Constitution of the State of Ohio. The Supreme Court of Ohio did not deny the petitioner the equal protection of the laws as provided by Article XIV, Section 1 of the Constitution of the United States and Article I, Section 2 of the Constitution of the State of Ohio.

STATEMENT OF THE CASE

The Statement of the Case by the petitioner in his Brief is different than would be stated by the respondents. The The Statement of the Case in petitioner's Brief does not contain references to the record and we will attempt to do so throughout our Brief.

We agree that in March, 1965, twenty-one discharged employees of the County Engineer's Road Department of Lake County, Ohio, filed an appeal from their termination with the State Personnel Board of Review. These appeals were filed pursuant to the civil service laws of Ohio as contained in Chapter 143 of the Ohio Revised Code. On April 21, 1965, a joint hearing was held before the State Personnel Board of Review in Cleveland, Ohio, on these appeals (R.6). On May. 6, 1965, the State Personnel Board of Review issued its decision with respect to these appeals as shown on page 6 of the record.

Thereafter, although these proceedings are not a part of the record, the Lake County Engineer filed an appeal from the decision of the State Personnel Board of Review with the Common Pleas Court of Lake County. As indicated in petitioner's Brief and in the opinion of the Supreme Court of Ohio shown on page 16 of petitioner's Brief, the appeal was dismissed for the reason that the Court had no jurisdiction of the subject matter. No appeal was taken from that decision of the Lake County Common Pleas Court.

The Lake County Engineer did not comply with the decision of the State Personnel Board of Review, and on September 28, 1965, respondents filed a Petition and a Motion for an alternative Writ of Mandamus in the Ohio Seventh District Court of Appeals (R.1-5). On October 2, 1965, an alternative Writ of Mandamus was issued by the Court (R.9). A demurrer was filed by the Lake County Engineer to the Petition, and on December 13, 1965, the demurrer was sustained by a divided Court (R.14-22). Thereafter, respondents filed an appeal to the Supreme Court of Ohio on January 17, 1966 (R.29). On June 15, 1966, the Supreme Court of Ohio reversed the Court of Appeals and remanded the cause to the Court of Appeals with directions to overrule the demurrer and allow the writ. The County Engineer filed a Motion for rehearing thereafter, which was denied by the Supreme Court of Ohio on July 20, 1966.

Petitioner's Brief contains several pages of attached exhibits claiming that the publicity displayed in these newspaper pages was prejudicial to the petitioner. This Court will note, however, that the record shows that at the time this publicity began, March 4, 1966, this case was awaiting decision by the Supreme Court of Ohio (R.29).

REASONS WHY THIS WRIT SHOULD NOT BE GRANTED

In the argument contained in petitioner's Brief, he repeatedly asserts that he has been denied due process of law in that he has been denied a right to a hearing on the matters pleaded in the Petition. Petitioner has had ample opportunity to have these issues presented to the proper court. Each quotation of authority used by the petitioner in his Brief uses references like "an opportunity for hearing", "the right to be heard", or "allowed a hearing". Petitioner had these rights and has not been denied them. The opinion of the Supreme Court of Ohio makes it specifically clear that had the petitioner taken an appeal properly from the decision of the administrative agency that he could have had reviewed all of the issues he now attempts to assert, The Petition in Mandamus in question plainly states that the petitioner did not appeal from the judgment of the Lake County Court of Common Pleas dismissing his appeal from the administrative agency. Since there was no timely appeal from either the decision of May 6, 1965, of the administrative agency, or the judgment of August 12, 1965, of the Lake County Court of Common Pleas, the matter is now *res judicata*. Neither the judgment of the Court of Common Pleas nor the decisions of the State Personnel Board of Review are subject to collateral attack. *State ex rel. Jones v. Ward, Director* (1964), 177 Ohio St. 89; *Claxton v. Simons* (1963), 174 Ohio St. 332; and *State ex rel. City of Cincinnati v. Geiger, et al.*, (1930), 38 Ohio App. 253.

A similar problem was considered by the Supreme Court of Ohio in the case of *Eggers, et al., v. Moore*, 162 Ohio St. 521, where the Court stated that:

> "Where an administrative agency has jurisdiction to make an order in the matter pending before it, and a right of appeal from such order to the Court of Common Pleas, is provided by law to any person ad-

> versely affected thereby, such person is not authorized to bring an independent action in equity to enjoin the carrying out of such order, where the grounds relied upon in seeking the injunction are such as could be fully litigated in an appeal authorized by law."

We have no wish to belabor this issue unnecessarily and believe that the citations set forth above are an adequate answer to the claim of petitioner.

Petitioner goes on at length in his Brief contending that his right to a fair trial and due process concerning the matters pleaded in the Petition were denied because of prejudicial publicity in the community. We agree that these rights have been secured to the petitioner and every citizen of the United States by decisions of this Court, including those cited by petitioner. However, when the publicity concerning activities of petitioner began in March, 1966, this matter was pending before the Supreme Court of Ohio. The only tribunal that could have been prejudiced by this publicity was the Supreme Court of Ohio. The Brief of petitioner does not show the names of the newspapers in which this publicity occurred, but the handwritten notes on the news clippings indicate the clippings are from newspapers published in Lake County, Ohio. Lake County, Ohio is approximately 150 miles from Columbus, Ohio, where the Supreme Court of Ohio sits. We look in vain in the Petition for even a reference that members of the Supreme Court of Ohio were aware of the events described in those news clippings. It is difficult for us to believe that the Judges of the highest court of our state could have been influenced by these events described in the exhibits, even if they were aware of them.

CONCLUSION

Petitioner has not been denied the opportunity to answer and contest the issues raised in the original proceeding. He did fail to appeal in timely fashion to the proper court. He should not now be permitted to have this Court rescue him from the situation he created. He had his opportunity and he failed to take it. He claims in the Petition to have been a victim of forces beyond his control, but at all times he could have had his review if he had followed the pertinent Ohio statutes.

Respectfully submitted,
Rankin M. Gibson,
John A. Brown,
Lucas, Prendergast, Albright & Warren,
Attorneys for Respondents.

Copy hereof mailed to Fred V. Skok, Lake County Prosecuting Attorney, the 15th day of November, 1966.

Rankin M. Gibson

APPENDIX

STATUTES

Ohio Revised Code Section 119.12 Appeal by parties adversely affected.

Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license, registration of a licensee, or revoking or suspending a license, may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident, provided that appeals from decisions of the liquor control commission may be to the court of common pleas of Franklin county. If any such party is not a resident of and has no place of business in Ohio, he may appeal to the court of common pleas of Franklin county.

Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin county, except that appeals from orders of the fire marshal, issued under section 3737.20 of the Revised Code, may be to the court of common pleas of the county in which the building of the aggrieved person is located.

This section does not apply to appeals from the department of taxation.

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. A copy of such notice of appeal shall also be filed by appellant with the court. Unless otherwise provided by law relating to a particular agency, such notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms. In the event an appeal is taken from the judgment of the court and the court has previously granted a suspension of the agency's order as provided in this section such suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated. No renewal of a license or permit shall be denied by reason of such suspended order during the period of the appeal from the decision of the court of common pleas. The final order of adjudication may apply to any renewal of a license or permit which has been granted during the period of the appeal.

Within twenty days after receipt of notice of appeal from an order in any case wherein a hearing is required by sections 119.01 to 119.13, inclusive, of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed shall, upon motion, cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed ten days, when it is shown that the agency has made substantial effort to comply. Such record shall be prepared and transcribed and the expense thereof shall be taxed as a part of the costs on the appeal. The appellant must provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record.

Unless otherwise provided by law, in the hearing of the appeal the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

The court shall conduct a hearing on such appeal and shall give preference to all proceedings under sections 119.01 to 119.13, inclusive, of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to such action. At such hearing counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence.

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. Such appeals may be taken either by the party or the agency and shall proceed as in the case of appeals in civil actions as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code. Such appeal by the agency shall be taken on questions of law relating to the constitutionality, construction, or interpretation

of statutes and rules and regulations of the agency and in such appeal the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record. Such appeals may be taken regardless of the fact that a proceeding was pending prior to the amendment of this section expressly authorizing such appeals, provided such appeals are perfected by the filing of notice of appeal within the time prescribed by section 2505.07 of the Revised Code.

The court shall certify its judgment to such agency or take such other action necessary to give its judgment effect.

Ohio Revised Code Section 143.27 Tenure of office; reduction, suspension, and removal.

The tenure of every officer or employee in the classified service of the state and the counties, cities, city health districts, and city school districts thereof, holding a position under sections 143.01 to 143.48, inclusive, of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of state personnel or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

In any case of reduction, suspension of more than five working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of state person-

nel and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

In the case of the suspension for any period of time, or demotion, or removal of a chief of police or a chief of a fire department or any member of the police or fire department of a city, the appointing authority shall furnish such chief or member of a department with a copy of the order of suspension, demotion, or removal, which order shall state the reasons therefor. Such order shall be filed with the municipal civil service commission. Within ten days following the filing of such order such chief or member of a department may file an appeal in writing, with the municipal civil service commission. In the event such an appeal is filed, the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm, or modify the judgment of the appointing

authority. An appeal on questions of law and fact may be had from the decision of the municipal civil service commission to the court of common pleas in the county in which such city is situated. Such appeal shall be taken within thirty days from the finding of the commission.